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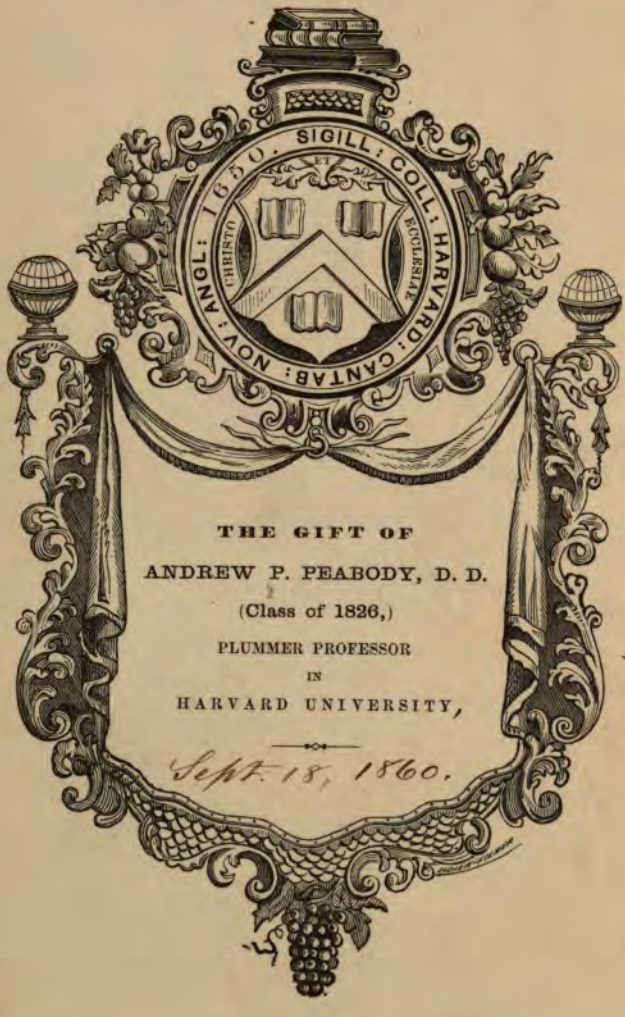
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THE GIFT OF
ANDREW P. PEABODY, D. D.
(Class of 1826,)
PLUMMER PROFESSOR
IN
HARVARD UNIVERSITY,

Sept. 18, 1860.

The Editor N. A. Review
with the author's compliments

AN INQUIRY

INTO

The Right of Visit or Approach,

BY

SHIPS OF WAR.

BY JAMES WHITMAN, ESQ., B. A.,
BARRISTER AT LAW, OF NOVA SCOTIA.

NEW YORK:
PUBLISHED BY JAMES MILLER,
No. 436 BROADWAY.
1858.

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AN INQUIRY

INTO THE

RIGHT OF VISIT OR APPROACH,

BY

SHIPS OF WAR.

THE recent visitation of several United States vessels, off the coast of Cuba, brought to the knowledge of Mr. Secretary Cass by newspaper reports, which, in several instances, have received contradiction by the masters of the vessels represented as having been outraged by such interference,* has been deemed of sufficient importance for a dispatch, dated 18th May last, to Mr. Dallas, the American minister to England, by which he is instructed to lay down certain principles for the information of the British Foreign Secretary. In that dispatch, to which all possible publicity has been given, General Cass, while basing his complaint upon the highly-colored newspaper reports of the occurrences, yet writes in regard to them, "The statements in the public journals contain the details of these transactions, but no authentic report on the subject has yet reached the department."

Will it be believed, also, that these very occurrences, of

* Besides other cases, see letters in *New York Times* of 26th May last, and other papers, from masters of brig "*S. Thurston*," schooner "*Marcia Tribou*," and ship "*Escourt*."

which Mr. Cass complains as outrageous proceedings, have happened as the natural result of his own request and directions?

It will be recollected, by almost every body who reads the newspapers, that on the 24th of December last (1857) Lord Napier, Her Britannic Majesty's minister at Washington, addressed a powerful remonstrance to the American Secretary of State, calling attention to "*the present activity of the African slave trade; to the fact that it is now chiefly prosecuted by the criminal and fraudulent assumption of the United States flag, and to the incommensurate means which are employed*" (by the Secretary's government) "*for its suppression.*"

His Lordship adds: "In illustration of the statements which I have brought under your notice, it may be desirable that I should add a brief catalogue of the vessels captured by Her Majesty's cruisers on the west coast of Africa, previous to the month of October last, with some of the circumstances attending the seizure; but, in framing this list, I must regret that there may be others of which the designation has not yet reached Her Majesty's Legation."

Cases were then cited as follows:

1st. The "Adams Gray," seized 10th April, by Her Majesty's ship "Prometheus;" her name and "New Orleans" being painted on the stern, and her *captain and mate, to all appearance, American citizens.*

2d. The schooner "Jupiter," with 70 slaves on board; fitted out at New Orleans; captured by H. M. ship "Antelope."

3d. The "Abbott Devereux," taken by the "Teazer," with two hundred and seventy slaves on board; sailed from off the coast of the United States, *via* Havana.

4th. The brigantine "Eliza Jane;" fitted out at New York; seized by the "Alecta," on 22d August.

5th. The schooner "Jos. H. Record," from Newport, Rhode Island; seized by "Antelope," with one hundred and

ninety-one slaves on board; five United States citizens among the crew.

6th. The "William Clark," of New Orleans; seized by "Firefly;" exhibited American colors, and forged American papers. The vessel was remarked to be in correspondence with another craft in the offing, under American colors.

7th. The brigantine "Onward," of Boston; owned by Messrs. Lafitte, of New York, and fully fitted for the slave trade.

8th. The bark "Charles," of Baltimore; fitted out at New Orleans.

9th. "General Pinckney," or Pierce.

10th. The bark "Splendid," of Boston.

11th. The "North Hand," of New York.

12th. The "W. D. Miller," under American colors.

13th. The "Panchita," of New York.

14th. The "Nancy," of New Orleans.

15th. The "Minentonga," stated by Admiral Grey, commanding at Cape of Good Hope, to be one of several American vessels fitted out for the slave trade, as follows:

16th. The "Isle of Cuba."

17th. The "Jamestown," of New York.

18th. The "Putnam."

19th. The "Charlotte," of New York.

20th. The "Wizard," of New Orleans.

21st. The "Petrel," of New York.

22d. The "Ellen," of New York.

23d. The "Cole."

24th. The "Globe."

25th. The "Spirit of '76."

26th. The "Reindeer."

27th. The "Vesta."

28th. The "Flying Eagle."

29th. The "James Buchanan."

Or nearly an American slaver for every state in the Union, and one of them bearing the name of its chief magistrate.

But while this letter of Lord Napier's, published in most of the New York journals of about the 21st of May last, may be well remembered, the reply which it called forth from General Cass seems to be almost universally overlooked, notwithstanding its pertinence to the present discussion.

Mr. Cass, replying to Lord Napier, under date of 10th April, 1858, (see *Washington Union* of 24th April subsequent,) remarks:

"Experience has come to test the measures proposed, and they have been found inadequate to the extinction of the evil, so much so, that, in the opinion of your government, its present activity demands increased exertions on the part of the United States, with a view to accomplish the object. Those exertions, it is suggested, should be directed to the coast of Africa, in order to render the blockade more effectual, and especially to examine and deal with vessels bearing the American flag and suspected of being engaged in this trade. This system of a joint blockade has been pursued for some years, and the benefit it has produced bears no reasonable proportion, I regret to say, to the expenditure of life and treasure it has cost. But this failure need not discourage the anxious hopes of Christendom. *There is another way of proceeding, without the dangers, and doubts, and difficulties, and inefficiency which beset a blockade, and which is sure to succeed if adopted and persevered in, and that is, to close the* SLAVE MART OF THE WORLD, OR RATHER, OF THE ISLAND OF CUBA, which is now almost *the only region were the slave dealer can find a market.* If these unfortunate victims could not be sold, they would not be bought. *To shut the ports of Cuba to their entrance, is to shut the ports of Africa to their departure*, and to effect this, nothing would seem to be wanting but the cordial co-operation of the Spanish government. The conventional arrangements which exist between Great Britain, and France, and Spain for their mutual co-operation in the suppression of the slave

trade are very imperfectly known to me, but it is understood that Spain has entered into engagements with Great Britain, if not with France also, that she will use her best exertions to prevent the importation of slaves into her dominions. This pledge, if given, has certainly not been redeemed, though it is difficult to believe that the Spanish government would resist or neglect the firm remonstrances of those two great powers, or even of Great Britain alone, if she alone has the right, by treaty stipulations, to demand of Spain the faithful performance of duties which she has voluntarily assumed. *Upon the course of the Spanish government far more depends than upon the most rigorous blockade of the African coast.*"

It is in accordance with such views on the part of Mr. Cass, that the British government turned its attention, for the suppression of the slave trade, from Africa to Cuba; deeming that the right of visit, as it had been exercised on the one coast, would be unobjectionable upon the other. It is true that the legitimate trade of the United States on the coast of Africa is of such small amount as to give rise to grave suspicions, when the American flag is frequently displayed: but, on the other hand, the island of Cuba is the great slave mart, and as most of the vessels known to be engaged in the trade are American built, the occasional inconvenience to which legitimate American traders on the coast of Cuba are subjected, ought not to be made a matter of serious complaint.

If the British naval officer generally meets the demand of his country, which "expects him to do his duty," there is none more anxious not to overstep the line of his instructions; and, in this particular case, the following letter from Commodore Rogers, bears an intelligent and honest testimony to the total absence of design on the part of Her Majesty's officers to injure or insult the flag of the United States. When such insinuations as we daily hear uttered in high places as to the malignant designs of England, or its

government, to force a war upon America, are received with general credence, the prospect of continual peace will become gloomy indeed.

But to the whole English nation there could be presented no state so horrible as a war with America—none to which they would make greater sacrifices to avoid. No journal that suggested any benefit to be derived therefrom, could live an hour, through the public execration it would invoke. No minister who valued his position, his fame, nay, even his personal safety or existence, would dare, in England, to lay measures in such train as to produce that fearful calamity; nor do we suppose, when the angry cloud of passionate misrepresentation which has been thrown around the subject of the recent visits to American vessels shall have passed away, that the American people will be less disposed to acknowledge that the truest interests of America, as of England, lie in peace with each other, at any sacrifice but that of duty; or that they will less honor such men as Rogers than those whose misguided or malignant patriotism paint the scenery of war with a brilliant light, only directed to reveal its spoils and prizes, while casting its train of suffering and horrors into intentional shade.

But let the better language of Commodore Rogers speak:

U. S. Steamer Water-Witch,
Key West, Thursday, *June* 3, 1858.

Sir: I arrived here safely to-day for coal. All well on board. I leave to-morrow for Havana, where I shall find H. B. M. steamer "Devastation," which has brought instructions from Admiral Seymour to the cruisers upon the coast of Cuba. H. B. M. steam gunboat "Jasper," commanded by Lieutenant William H. Pym, came into this harbor this morning in search of the "Styx," to deliver dispatches from the Admiral. Lieutenant P. stated to me that his instructions were printed, and were dated, he believed, 1849; that *they were, at all events, the instructions he had acted upon on the coast of Africa nine years ago.* He said he believed,

or rather was sure, no new instructions had been received from the British government for the guidance of the vessels on the coast of Cuba. He said that the "Creole" was a slaver, and that soon after her capture colors and papers both disappeared, the captain declaring that he was not entitled to American papers or colors.

He said that, in another case, where he had sent his quartermaster with a spy-glass to ask permission to ascend the mast of the outermost vessel in the harbor of Matanzas, in order to see whether the "Styx" was in sight, the captain said laughingly afterwards, that he had hoaxed a newspaper writer into the belief that he had been boarded by British fillibusters. He asserted that he was sure, upon examination, he would be found to have done no wrong to the American flag. *He admitted that, in certain cases, he had fired near vessels to make them show their colors, and asked me if he had been guilty of any wrong in so doing. To this I said that I had no official opinion, but that I thought not.*

However the law may be in this case, it is held, as far as I know, the usage of the sea service (itself a law) for men-of-war to show their flags to one another; and it is the general opinion of naval men that merchant vessels, upon neglect or refusal to do so, may be compelled to do it, without trenching upon their rights. Lieutenant Pym seemed surprised at the light in which the acts of the British cruisers are regarded by the government of the United States.

I have the honor to be, your obedient servant,

JOHN RODGERS,
Commander, United States Navy.

The Hon. ISAAC TOUCEY, Secretary of the Navy.

"*Audi alteram partem*," is a principle which all men, not given up to such influences as the gods first inflict upon those whom they wish to destroy, will naturally follow before they thunder out their decision, founded solely upon the *story* told them first.

Brief and unsatisfactory as the interval has been to obtain a full hearing of the other side, we have yet, through partisan channels, such vindication with regard to the visitation of American vessels before alluded to, as the following communication, which, without any very uneasy

stretch of the imagination, may fix a denial *in toto* upon all the tales of British outrages, poured forth in such patriotic strains by journals caring less to err upon the side of truth, than to find a market for their principles and assertions.

In the *New York Times* of June 17th of this year, (1858,) we find the following:

STATEMENT OF LIEUT. PYM, OF H. M. STEAMER JASPER.

The Key West correspondent of the *Charleston Courier*, under date of June 10th, says:

"The British gunboat "Jasper," Lieut. Com. Pym, reported by the "Atlantic" as at this port on the 4th, sailed the same day on a cruise in search of the steamer "Styx," having dispatches from the British Admiral for the commander of that vessel, he being the senior officer of the West India fleet. The dispatches are supposed to relate to the boarding and searching exploits of the squadron, with orders, doubtless, to discontinue the same.

"An American naval officer had a long conference with Lieut. Pym, the evening of his arrival at Key West, upon the present all-absorbing subject of the 'right of search,' and the overhauling and firing into American vessels in the gulf. Lieut. Pym assured the officer that *no new instructions* had been given him by his government, but that he and all his consorts were acting under printed orders issued in 1849. The activity of the fleet, as manifested by their boarding and firing into some forty or fifty vessels during the two past months, probably had its origin in this wise: 'A few weeks ago,' said Lieut. Pym, 'when cruising off the Moro, I boarded an American vessel that had just left port, and, in answer to inquiries for news, was told that a splendid clipper ship was fitting out for the slave trade, and would be ready to sail the following day. I accordingly watched for her, and had the satisfaction the following day of taking a valuable prize. She had the most complete outfit, a large stock of provisions, ample accommodations for one thousand five hundred slaves, and besides a bag containing 2,300 doubloons, with which her cargo was to be purchased. Proof being sufficient, she was taken to Jamaica, libelled and condemned. She was a lawful prize, and sold, with all on board, for $100,000. The steamer "Styx" being

in sight, was entitled to one-half the prize money, or my share would have been $10,000. As it was, I received $5,000 for a couple of hours work.' He should have mentioned the fact that seventeen shots were fired at the ship before she gave up, all of which were fired by Lieut. Pym, who, fearing she might be a merchantman, all blame would be attached to him alone. It is reasonable to suppose that this success has prompted the British fleet to increased zeal in scouring our seas in search of vessels engaged in the slave trade. The seizure and condemnation of this first-class ship (she had been used by the French as a transport during the Russian war) would show that respectability, size, and beauty of model, in vessels passing a cruiser at sea, was no proof that her mission was a commercial one.

"Lieut. Pym asserts that the newspaper accounts are much exaggerated, and in many instances are altogether false. The seizure of the 'Cortez,' an account of which has gone all over our land, is an instance of the grossest exaggeration. The captain of that vessel, when overhauled by the gunboat, threw his flag and his papers into the sea, and declared himself to be a Spaniard. Contraband articles were found on board, all clearly proving the vessel to be a slaver. She was accordingly sent to Jamaica as a prize, and is doubtless condemned and sold. Lieut. Pym complains that many of our shipmasters have a habit of running their colors up and instantly hauling them down, not allowing the wind to unfurl them. He thinks, as an act of mere courtesy, the colors of a vessel should be boldly shown, and allowed to remain at the peak a reasonable time. He is not aware of having exceeded any instructions authorized in his printed regulations, of date 1849. He is ready and anxious to explain each and every case of boarding in which he has been concerned; he will answer for himself, and his officers, that the routine of boarding and examining American vessels has been conducted in an unexceptionable manner, and without any intention of insult, or any exhibition of rudeness or ill-temper, and if any of our national rights have been invaded, it is his government who gave him his orders, who must answer."

We cannot reasonably infer from the statements in Lord Napier's letter, that the United States flag *per se*, is, as most

of the leading advocates against the right of visit to any craft hoisting it assert, above suspicion—an argument which the late Daniel Webster endeavored to establish, when, as Secretary of State he addressed his somewhat famous manifesto, under date of 28th March, 1843, to Mr. Everett, the American minister to England.

The Earl of Aberdeen, then British Foreign Secretary of State, thus enunciates the principles of his government.

"The undersigned again *renounces, as he has already done in the most explicit terms, any right on the part of the British Government to search American vessels in time of peace.*

"*The right of search*, except when specially conceded by treaty, is a purely belligerent right, and can have no existence on the high seas during peace. The undersigned apprehends, however, that the right of search is not confined to the verification of the nationality of the vessel, but extends to the objects of the voyage and the nature of the cargo. *The sole purpose of the British cruisers is to ascertain whether the vessels they meet with are really American vessels or not.* The right asserted has in truth no resemblance to the right of search, either in principle or in practice. It is simply a right to satisfy the party who has a legitimate interest in knowing the truth, that the vessel actually is what her colors announce. *This right we concede as freely as we exercise.*" See Lord Aberdeen's letter to Mr. Everett, London, December, 1842.

This argument is, however, met on the part of General Cass by a denial of any distinction between the right of search and visit; a position, in which, as we shall show, he is not borne out either by reason or authority. The right to visit ships hoisting American colors is also stated to be an assumption of modern date, whereas it has been the custom from time immemorial for ships of war of all nations to visit vessels at sea, suspected of any false assumption of nationality for illegal or criminal objects. Lord Aberdeen, in his letter

of 13th October, 1841, to Mr. Stevenson, then the American minister at London, says: "*It has been the invariable practice of the British navy and of all the navies in the world, to ascertain by visit the real nationality of merchant vessels on the high seas, if there be good reason to apprehend their illegal character.*" See Wheaton on the Right of Search, page 125.

One of the principal reasons why the right of visit, as distinguished from the right of search, may have to many minds the appearance of a new principle in the law of nations, is, from the fact of the previous claim of British ships of war to *search* American vessels having been always exercised in conjunction with the right of *visit* as incidental to it; and though no renunciation of the claim to the right as exercised by Great Britain, and causing the war of 1812 with the United States, was mentioned in the treaty conclusive of the war, yet England has, of her own consent, and to a much greater extent than that to which the objects of the war on the part of the United States were directed, renounced the right of search as then claimed by her, but not the right of visit.

We come now to the very essence of the whole DIFFICULTY: What constitutes an American vessel? Does a vessel become American by hoisting the American flag? If not, how are you to ascertain that she is American, or to what nation she belongs? Certainly, by a reference to her papers, which at sea cannot be either easily or conveniently done without first boarding her for the purpose. But says Mr. Webster, in his letter on this subject to Mr. Everett, dated 28th March, 1843:

"If visit or visitation be not accompanied by search, it will be in most cases nearly idle. A sight of papers may be demanded, and papers may be produced. But it is known that slave-traders carry false papers, and different sets of papers. A search for other papers, then, must be made where suspicion justifies it, or else the whole proceeding would be nugatory. In suspicious cases, the language

and general appearance of the crew are among the means of ascertaining the national character of the vessel. The cargo on board, also, often indicates the country from which she comes. Her log-book, showing the previous course and events of her voyage, her internal fitment and equipment, are all evidences for her, or against her, on her allegation of character. These matters, it is obvious, can only be ascertained by rigorous search."

The objection to this argument has been so intelligibly and conclusively met by the editorial of the *Evening Post* of June 7th ultimo, that we cannot do better than subjoin that part of it which relates to this particular point:

"If papers are not conclusive proof of a vessel's nationality, when demanded by a British cruiser, on suspicion of being engaged in the slave trade, how are they conclusive proof of her neutrality, when boarded by belligerent cruisers in time of war; or how do they 'show her national character, or the lawfulness of her voyage in the ports of those countries to which she may proceed for purposes of trade?' If they may be forged, or held in duplicate in one case, why not in the other? Suppose a war broke out between England and France to-morrow, and Yankee speculators sent cargoes of rifles or gunpowder or any other article contraband of war to Havre, and the ships were boarded on the way in the middle of the Atlantic, why might they not exhibit forged papers showing their destination to be Constantinople, and why might not this very possibility be used as an argument by General Cass against their being boarded at all? If Mr. Webster's argument proves any thing, it proves the absurdity of giving a ship any papers whatever, or asking her to carry any colors. Custom-house clearances are, by this reasoning, a stupid formality, and Howell Cobb's elaborate refusal of them to Messrs. Lafitte & Co., the other day, for the purpose of bringing over 'African apprentices,' a piece of barren diatectics."

That the right of visit, as claimed and now acted upon by Great Britain, has been the doctrine ever since the establishment of any recognized principles of international law, there can hardly be any reasonable doubt. It has been the

principle upon which the seas have been so happily cleared of pirates. It is a principle which is being daily acted upon in the Chinese and Eastern seas, *to the exercise of which, in those waters*, no manner of objection would ever be taken by the United States, if the flag of that country were fraudulently assumed by Malay or other eastern rovers; because the pirates of that region, as *hostes humani generis*, are dreaded by American ships themselves, and they feel that the submission to the claim of visit is but the surrender of a part of their natural liberty for its better ultimate protection and warranty as a whole.

In carrying out the logical consequence of the principle as contended for by General Cass, the *reductio ad absurdum* becomes evident in the following application.

We will suppose an English vessel, engaged as a pirate, a slaver, or indeed, engaged in any traffic whatever, to hoist an American flag in sight of a British cruiser, whose suspicions are excited as to her really being an American vessel, and which suspicions are, by actual visit, confirmed in the discovery of the true character of the vessel. Now, in this case, a violation of the American doctrine will have been committed, and according to that doctrine, an outrage, also, to the American flag will have been offered; for both of which, apology must be offered, and redress awarded. But to whom is the measure of damages to be paid? And, seriously, is it expected that Great Britain, or any other nation, will, or can, part with jurisdiction over her own subjects, by concurring in a doctrine whose legal and necessary consequence would compel her so to do?

Should the doctrine hold, that the flag alone, without any further authentification of nationality, protects every ship from visit, we shall soon see the ocean again infested with pirates, and perhaps a bloody battle fought between two great nations before the liberty to extirpate them can be obtained. But whether that would happen or not, the obtaining of such doctrine would be a virtual relinquish-

ment of all interference with the slave trade, if not, indeed, the signal for its speedy legalization and vigorous re-establishment.

While General Cass points to Cuba as the only existing slave mart of the world, it is well known that active measures and a large amount of capital are in operation along the banks of the Mississippi for the introduction of slaves from Africa into that region. Whether as yet any cargoes have been successfully introduced, no one can either affirm or deny, but public rumor is rife on the subject.

We have seen by the letter of Commodore Rogers, that the British cruisers are doing nothing more on the coast of Cuba with regard to American vessels than they have been doing on the coast of Africa, since 1849, and not half so much as they were then and there previously in the habit of doing, ever since the slave trade had been made illegal by the laws of the two nations.

Indeed, it appears by the recent debate in the House of Lords, on the 17th of June last, that Lord Aberdeen, speaking of the instructions under which he supposes the British cruisers to be at present acting, states, "they were drawn up with great care and attention, *communicated at the time to the American government, and acquiesced in by Mr. Webster on the part of that government!*"

Some expressions dropped by Lord Malmsbury, in that debate, have given rise to an impression of an acquiescence by the British government in the doctrine claimed by the ultra advocates of the American right, viz.: that the mere hoisting of an American flag by any vessel, no matter how strong the suspicions may attach to her of not being American, and of her being engaged in criminal or unlawful traffic, gives such vessel perfect immunity from any visit or molestation by ships of war other than those of the American nation.

Sure it is, that no one present at that debate, so understood the noble Secretary for Foreign Affairs, nor can we

possibly conceive such to have been his meaning. Lord Malmsbury said the British government had, upon consultation with the legal advisers of the crown, come to an acquiescence with the doctrine as to the right of visitation and search, put forth by General Cass on behalf of the American government, in his dispatch to Mr. Dallas, of the 18th of May last. But what doctrine was that? Quite different from that expounded by the American Secretary on other occasions, and in effect similar to the doctrine upon which Great Britain has for some years been acting, viz., in Mr. Cass's own language:—

"A merchant vessel upon the high seas is protected by her national character. He who forcibly enters her does so upon his own responsibility. Undoubtedly, if a vessel assume a national character to which she is not entitled, and is sailing under false colors, she cannot be protected by this assumption of a nationality to which she has no claim. As the identity of a person must be determined by the officer bearing a process for his arrest, and determined at the risk of such officer, so must the national identity of a vessel be determined at the like hazard to him who, doubting the flag she displays, searches her to ascertain her true character. *There, no doubt, may be circumstances which would go far to modify the complaints a nation would have a right to make for such a violation of its sovereignty. If the boarding officer had just grounds for suspicion, and deported himself with propriety in the performance of his task, doing no injury, and peaceably retiring when satisfied of his error, no nation would make such an act the subject of serious reclamation.*"

This is the acquiescence in the American doctrine which Lord Malmsbury, in the Peers, and Mr. Fitzgerald, in the Commons, announced the British government as having come to. But Lord Aberdeen had written to the American minister as early as 1841, in defence of the claim of the right of visit under warrantable suspicion, that, "if in spite of the utmost caution, an error should be committed, it will be followed by prompt reparation, and the British

cruisers have no right to interfere with American vessels, whatever their destination, even if engaged in the slave trade."

Any nation in earnest to put down the slave trade must allow ships of war the right to visit merchant vessels, under suspicious circumstances; otherwise, all laws for the suppression of such criminal pursuits will remain a dead letter.

In the language of Mr. Emmett, counsel for the appellants in the case of the "Marianna Flora," 11 Wheaton, p. 11:— "The dangerous pirates are, for the most part, not difficult to distinguish. Their *haunts*, their habits, their appearance, point them out; and though the commissioned officer acts on his own risk, *yet, if he act on those 'indicia,'* and on information and evidence of guilt, he incurs no real danger of being liable to damages, and, in any event, may rely on the justice and liberality of his own government for protection."

Lord Stowell, that enlightened expounder of the law of nations, as applied to maritime rights, whose decision in the case of "Le Louis" is so often quoted as such high authority by the advocates of the American view of the question of the right of visit, says, in the case of the "Maria," 1 Robinson, Admlt. Rep., p. 372: "Even those who contend for the" (then) "inadmissible rule that free ships make free goods, must admit the exercise of the right of visitation and search, for the purpose of ascertaining *whether the ships are free or not.*"

This, though spoken of as the exercise of a belligerent right respecting neutrals, is a precisely analogous mode of reasoning in the case of the right of visit to ships in time of peace, under the suspicion of being engaged in carrying slaves, in order to ascertain whether they are so engaged or not, or whether the ships are free from seizure or not, from being so engaged.

Kent, the great expounder of American law, lays down the doctrine in a note to the first volume of his Commentaries, page 153, sixth edition, as follows: "The in-

tervisitation of ships at sea is a branch of the law of self-defence, and is, in point of fact, *practised by the public vessels of all nations*, including those *of the United States*, when the piratical character of a vessel is suspected. The right of visit is conceded for the sole purpose of ascertaining the real national character of the vessel sailing under suspicious circumstances, *and is wholly distinct from the right of search.* It has been termed by the Supreme Court of the United States *the right of approach* for that purpose, and it is considered to be well warranted by the principles of public law, and the usages of nations."

It would seem almost superfluous to quote authorities to establish a principle so clearly based upon reason; and one must be driven to conclusions not very favorable to the sincerity of parties, bound by treaty stipulations for the suppression of the slave trade, who object to the right to visit ships under any reasonable suspicion of their being engaged in that traffic, to ascertain whether they really belong to the nation whose flag they display.

To the same end as the dictum of Chancellor Kent, the principles of Judge Story, in the case of the "Marianna Flora," (11 Wheaton's Reports, p. 43,) necessarily point.

That learned Judge there says, "It has been argued that no ship has a right to approach another at sea; and that every ship has a right to draw around her a line of jurisdiction, within which no other is at liberty to intrude; in short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

"This doctrine appears to us novel, and is not supported by any authority. *It goes to establish upon the ocean a territorial jurisdiction like that which is claimed by all nations within canon shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it.*

"Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and hitherto there has never been supposed, in such conduct, any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their governments to arrest pirates, *and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters.* Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach or to impede them in their lawful commerce."

Another great writer lays down the principle as follows:

"The fear of meeting with a pirate, and being the dupe of deceitful appearances, *is the reason why no credit is given to the flag of a vessel, though a ship of war.*" 2 Azuni, 204, 602, c. 3, § 3.

Bynkershoek, as quoted by Mr. Wheaton, in his treatise on International Law, p. 550, elsewhere observes:

"It is lawful to detain a neutral vessel *in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral.*"

The same principle, though, in this particular statement, referred to as a belligerent right, is equally applicable to the right of visit, in time of peace, for the same end, viz.: to ascertain the real character of the vessel; for instance, whether the vessel be really an American vessel, or a pirate engaged in the slave trade—for, by the laws of the United

States, as well as by those of England, the African slave trade is declared *piracy* to its own citizens engaged in it. Mr. Chancellor Kent, in the first volume of his Commentaries, page 191, says: "The African slave trade is an offence against the municipal law of most nations in Europe, and it is declared to be piracy by the statute laws of England and the United States."

In the long and tedious negotiations for the suppression of the slave trade, between the governments of Great Britain and the United States, Mr. Adams, then minister of the latter country at London, in a letter of 31st March, 1823, to Sir S. Canning, transmitted therewith a copy of the act of Congress of 15th May, 1820, by which "any citizen of the United States, being of the crew of any foreign ship engaged in the slave trade, or any person whatever being of the crew of any ship owned, in whole or in part, or navigated on behalf of American citizens, participating in the slave trade, is declared to have incurred the penalty of piracy, and made liable to atone for the crime with his life." (See Wheaton on the Right of Search, pp. 83, 84.)

So long, then, as the laws of this country and her convention with Great Britain remain as they are, making the slave trade piracy, it is impossible to suppose that vessels, naturally subjecting themselves, or being subjected, to suspicions of being engaged in that traffic, whether from the fact of their vicinity to such places where the trade is carried on, or from the fact of the flag of their country having been prostituted to its protection, can be released from that supervision, on the part of vessels of war, necessary to ascertain their real character, whether it be called an act of visit, *or approach*, or by any other name; and such is the view taken by many of the really candid and intelligent journals of the United States.

The *Charleston Mercury* says upon this subject:—"Here, again, we see the humiliating position in which the United States are put by our absurd legislation with regard to the

African slave trade. As a pirate is *hostes humani generis*, no cruiser of any nation, it is supposed, can be blamed for ascertaining by force whether a vessel is a pirate or not.

"*Hence the cruisers of every nation in the world have a right to come upon our coasts, and overhaul every vessel which they think proper to suspect of being engaged in the African slave trade, the laws of the United States declaring them to be pirates.*"

The position assumed by this leading journal is the more open and manly one, of repealing the laws of the United States, and denouncing the treaties making the slave trade piracy, rather than continuing them and making them a dead letter, by the denial of their necessary consequences.

The fact then is, so far from the right of visit under reasonable suspicion, even in time of peace, being an interpolation of the law of nations, the right to resist it is a doctrine which, until late years, has never been assumed, and that only by the United States.

If they deny the power of any one nation, or indeed as they do, of any number of nations without the consent of *all*, to change any of the recognized principles of international law, how absurd that they should assume a right with respect to themselves, to which all other nations submit; a right, too, which England as freely concedes with regard to her own vessels as she claims with regard to others.

The weakness of any principle of international law upon which the resistance of the right of visit can be based, is evident from the urgency and haste with which the decision of Lord Stowell, in the case of "Le Louis" is pressed to maintain it. Any one at all familiar with the decisions of this learned Judge, and indeed with the particulars of that decision itself, will know the fallacy of the assertion, that any dicta of Lord Stowell's can be adduced, other than as confirmatory of the ground which Great Britain maintains upon this question.

In the case of "Le Louis," (2 Dodson's Adm. Reports, p.

237,) the slave trade was then (1816) not only not declared piracy by the laws of the country to which that vessel belonged, but actually protected by them. Had the laws of France and her convention with England then allowed it, Lord Stowell would have sustained the capture and condemnation of the French ship "Le Louis," and, of course, supported the right of visitation as necessarily incidental, in the same manner as he had previously sustained the condemnation of the American ships "Amedie" and "Fortuna," to the particulars of which we shall afterwards recur.

In regard to "Le Louis," Lord Stowell says:—"The right of visitation being in this present case exercised in time of peace, the question arises, how is it to be legalized?"—thereby admitting that it could be legalized—"and looking to what I have described as the known existing law of nations, evidenced by all authority and all practice, *it must be upon the ground that the captured vessel is to be taken legally as a pirate*, or else some new ground is to be assumed, on which this right which has been distinctly admitted not to exist, can be supported."

Arguing the question that the slave trade was not then piracy by the laws of England or France, his lordship says:—"No lawyer, I presume, could be found hardy enough to maintain that an indictment for piracy could be supported by the mere evidence of a trading in slaves."

The learned Judge then goes on to show the legality of the slave trade as previously permitted and encouraged by different civilized nations, arguing that in the absence of direct and positive statutes it could not be considered a violation of national law, and further showing that in this case of "Le Louis" there was no violation of the municipal law of the country to which that vessel belonged, and that England had no right to inflict a punishment upon the subjects of France in the prosecution of a trade, which, though it might even be considered criminal by the laws of other nations,

was tolerated by those of their own. Hence the reason for that so often misquoted remark, that "to press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa, by trampling on the independence of other states in Europe; in short to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice. Obtain the concurrence of other nations if you can, by application, by remonstrance, by example, by every other peaceable instrument which man can employ to obtain the consent of man. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose, nor in setting out upon a moral crusade of converting other nations by acts of unlawful force."

Nowhere throughout the whole of this case does Lord Stowell refer to any change of his opinion, as expressed in the cases of the "Amedie" and "Fortuna," but six years previously. Had the circumstances given rise to any such change, he would have avowed it, and given his reasons for it.

The fact is, there was no change in his opinion. Only the circumstances of the case of "Le Louis," not the principles upon which it was decided, were different from those of the "Amedie" and "Fortuna."

In the case of the "Amedie," (1 Acton's Admiralty Reports, p. 240,) Sir William Grant decided, that "Transportation of slaves from the coast of Africa to Matanzas, in the island of Cuba, a colony of the enemy, was illegal, and affects the property of the ship and her cargo of slaves. The decree of the court below affirmed, condemning the cargo of slaves as prize, (afterwards set at liberty,) and the ship as lawful prize to the captor. The trade considered to be prohibited by the American law, which, having been officially notified to the court, the neutral was excluded from the

benefit he would otherwise have derived from the silence or permission of the law of America, notwithstanding the prohibitory enactments of Great Britain."

The doctrine in the "Fortuna," as laid down by Lord Stowell, then Sir William Scott, was: "that any trade contrary to the general law of nations, *although not tending to, or accompanied with, any infraction of the belligerent rights of that country* whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. The slave trade is now deemed, by this country, contrary to the law of nations, unless tolerated by the municipal regulations of the state to which the owners of the vessel engaged in the trade may belong." (1 Dodson's adm. Reports, p. 81.)

The judgment of Sir William Grant in the previous case of the "Amedie" was referred to and endorsed by Sir William Scott in this case of the "Fortuna," in the following terms: "the case of the 'Amedie' will bind the conscience of this court to the effect of compelling it to pronounce sentence of confiscation."

See also condemnation of the "Africa," "Nancy," and "Anne," American slavers, 2 Acton's Adm. Rep., pages 1 to 11.

In the case of the "Diana," a Swedish vessel, condemned at Sierra Leone for being engaged in the slave trade, Sir William Scott, on appeal, reversed the decision, on the ground that Sweden had not abolished the slave trade.

This decision was given in 1813, four years prior to that of "Le Louis;" and as the cases are analogous, and the learned Judge refers in that of the "Diana" to the judgment of Sir William Grant in that of the "Amedie," as containing no principle at variance with his decision regarding the "Diana," we can easily see how the case of "Le Louis" has been tortured to an application which does not belong to it; and that the *principles* of Lord Stowell's judgment in "Le Louis" and Sir William Scott's in the

"Fortuna," are as identical as the Judge who decided upon both cases.

At the risk of being tedious on this point, it will be necessary to give the following extract from the judgment of Sir William Scott in the "Diana."

"The principle which has been extracted by the Judge of the court below, from the case of the "Amedie," is the reverse of the real principle there laid down by the Superior Court, which was, that where the municipal laws of the country to which the parties belong have prohibited the trade, the tribunals of this country will hold it to be illegal upon the general principles of justice and humanity, and refuse restitution of the property; but, on the other hand, though they consider the trade to be generally contrary to the principles of justice and humanity, where not tolerated by the laws of the country, they will respect the property of persons engaged in it under the sanction of the laws of their own country. The Lords of Appeal did not mean to set themselves up as legislators for the whole world, or presume in any manner to interfere with the commercial regulations of other states, or to lay down general principles that were to overthrow their legislative provisions with respect to the conduct of their own subjects."

Mr. Wheaton in his treatise on the Right of Search, takes strong ground against even the right of visit, but argues the question with a partiality painful to see in a person of such varied accomplishments and acknowledged ability. He takes great credit to the United States as being the first to abolish the slave trade. This is not altogether correct. The slave trade was certainly prohibited to Americans as far as foreign states were concerned, in 1794, but was permitted between Africa and the United States up to the year 1808, while the British act prohibiting this traffic was passed on the 25th of March, 1807, though it had previously passed the Commons in 1794. So that, in reality, the British nation was the first to prohibit it, as it has always been

the most urgent and most active in the enforcement of the consequences of such prohibition.

According to Wheaton, (International Law, p. 178,) "The final abolition of the African slave trade was stipulated by the treaties of Paris, Kiel, and Ghent, in 1814; confirmed by the declaration of the Congress of Vienna, of the 8th of February, 1815, and reiterated by the additional article annexed to the treaty of peace concluded at Paris on the 20th of November, 1815. The accession of Spain and Portugal to the principles of the abolition was finally obtained by the treaties between Great Britain and those powers, of 23d September, 1817, and the 22d of January, 1815; and by a convention concluded with Brazil in 1826, it was made piratical for the subjects of that country to be engaged in the trade after 1830."

"By the treaties of the 30th of November, 1831, and 22d of May, 1833, between France and Great Britain, to which nearly all the maritime powers of Europe have subsequently acceded, the mutual right of search was conceded, within certain geographical limits, as a means of suppressing the slave trade. The provisions of these treaties were extended to a wider range by the quintuple treaty, concluded on the 26th of December, 1842, between the five great European powers, and subsequently ratified between them, except by France, which power still remained only bound by her treaties of 1831 and 1833 with Great Britain."

By the treaty concluded at Washington the 9th of August, 1842, between the United States and Great Britain, referring to the 10th article of the Treaty of Ghent, by which it had been agreed that both the contracting parties should use their best endeavors to promote the entire abolition of the traffic in slaves, it was provided, article 8, that "the parties mutually stipulate that each shall prepare, equip, and maintain in service, on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry in all not less than eighty

guns, to enforce separately and respectively the laws, rights, and obligations of each of the two countries for the suppression of the slave trade, the said squadrons to be independent of each other, but the two governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces as shall enable them most effectually to act in concert and co-operation, upon mutual consultation as exigencies may arise, for the attainment of the true objects of this article; copies of all such orders to be communicated by each government to the other respectively."

This is the present and only treaty which has ever gone into effect between Great Britain and the United States for the suppression of the slave trade; though other nations, even Spain and Brazil, have entered into far more stringent arrangements.

The American government seems almost always to have evaded the question of treaty stipulations for the suppression of the slave trade with Great Britain, whose constant endeavors have been so long and uniformly exerted to bring the United States into some settled plan of concert with other nations on the subject. So much so has this been the case, that it has given rise to strong doubts as to its sincerity in desiring the suppression of the slave trade.

First, we find Lord Castlereagh zealously urging the matter upon Mr. Rush, American minister at London, and while Mr. Adams, the Secretary at Washington, instructed the latter to reply, that the President desired him "to give the strongest assurances to the British government that the solicitude of the United States continued, with all the earnestness that had ever distinguished the course of their policy in respect to that odious traffic," we find these mere professions considered quite satisfactory, and as all that could really be done.

Next, in 1820, Sir Stratford Canning, the British minister at Washington, brought the matter before Mr. John Quincy Adams, the American Secretary of State, but with no more

satisfactory an issue than a lengthy reply, describing the horrors of the slave trade, with counter-proposals. Sir Stratford returned to the charge in 1823, but only received a copy of an act of Congress, stating the slave trade to be piracy, and that American citizens should be hung if taken *in flagrante.*

But Sir Stratford was not fated to be so successful in his negotiations with the rising republic, as he has since been with the despotic Porte. He kept on writing and urging, but to little purport, save at last, in April, 1824, a treaty was concluded making the slave trade piracy, and conceding the mutual right of visitation and search between the vessels of Great Britain and the United States, *on the coast of Africa, America, and the West Indies*, and signed on the part of Mr. Rush for the latter, and Mr. Huskinson and Mr. Canning for the former country. What fascinations could have been brought to bear on Mr. Rush to sign an agreement so soon to be repudiated at home?

Then we must pass over a long, barren bleak, till we come to the unfertile arrangements of 1842, the terms of which we have previously given, and which seem only to have resulted in the notoriety they have won for the American flag as a safeguard to slave-trading interests, and the principles they have instilled into the minds of the recent meeting of the *soi-disant* ship-owners of New York, that "our flag covers the cargo, whether that cargo consists of niggers or nothing."

If the deck of an American vessel is to be considered as inviolable as American soil, are these the means by which it is to be brought about?

The argument that a ship at sea and a man ashore hold equal rights with regard to visit or arrest, is simply absurd; though if the policeman, following on the wake of a suspicious character on land, can get into his haunts to ascertain the nature of the cargo he is carrying away, he does not generally hesitate upon the question of his right to visit.

But as the sea is different from the land, so are the police regulations which govern each. No nation—at least Great Britain does not—claims the right to stop or rule American vessels at sea. England only claims the right to know whether the vessels she meets and suspects of being pirates upon the ocean, are—though hoisting an American flag—really American vessels or not. As before quoted from Judge Story, the doctrine of any ship's appropriating so much of the ocean as she may choose, and preventing any nearer approach, seems to be novel, and not supported by any authority. "It goes," he says, "to establish upon the ocean a *territorial jurisdiction*, like that which is claimed by all nations within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon *the principles of sovereign and permanent appropriation, and has never been successfully asserted beyond it.*

A ship at sea is, as it were, a floating island upon the ocean. If it were fixed and stationary as the soil, then it would be the duty of all vessels to know and respect its territory. But inasmuch as it is transitory in time and movable in space, as it occupies a portion of an element common to all other vessels, it becomes necessary, when suspicions warrant the inquiry, before full credit can be given to the display of a mere signal, hundreds of which, of different nationalities, it can display in as many hours, that the documents which really create the ship's nationality should be produced, in order to give her claim to that inviolability which appertains to the soil of the country to which she belongs.

Despite the unreasonableness of the cause, one cannot but admire the spirited position taken by the American people against what they conceive to be an injury or affront put upon their national pride. But the chief danger in the impetuosity manifested upon such occasions, lies in the imagination of injury where none is intended, or exists; and the

rash measures so openly advocated by leading members of Congress, are a consequence of such imagination, or worse still, a concession to a supposed state of public opinion, which perhaps, after all, has no real existence. Any one who understands the American people, knows them to be as generous, and quick to acknowledge what they feel to be candid and correct treatment, as they are hasty and imprudent in resisting what they consider the reverse. Even if their position should be the correct one, upon the question of visit, an amicable settlement of that matter can easily be arranged by diplomatic effort, as far as the slave trade is concerned, which is the only case where the right can ever be objectionably exercised by Great Britain. Let us hope the day is distant, nay, will never come, when these two great powers of Christendom shall so falsify their moral and political creed, as to commit the settlement of such disputes to the bloody arbitration of war.

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